



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

AUG 24 2010

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Vickers L. Cunningham, Sr.  
9090 N. Stemmons Frwy., Suite A  
Dallas, TX 75247

RE: MUR 6247

Dear Mr. Cunningham:

This is in reference to the complaint you filed with the Federal Election Commission on January 19, 2010, concerning David Smith and [www.examiner.com](http://www.examiner.com). After considering the circumstances of this matter, the Commission determined to dismiss this matter on the basis of prosecutorial discretion and closed the file on July 27, 2010. The Factual and Legal Analysis explaining the Commission's decision is enclosed.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

P. Christopher Hughey  
Acting General Counsel

*Mark D. Shonkwiler* <sup>KDX</sup>

BY: Mark D. Shonkwiler  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3  
4 **RESPONDENTS:** www.examiner.com

MUR: 6247

5 Anschutz Company

6 Clarity Digital Group, LLC

7  
8 This matter was generated by a complaint filed by Vickers L. Cunningham. *See*  
9 2 U.S.C. § 437(g)(a)(1). The complaint alleged that Anschutz Company ("Anschutz")  
10 and Clarity Digital Group, LLC, d/b/a Examiner.com ("Examiner") (together, the  
11 "Examiner Entities"), violated the Federal Election Campaign Act of 1971, as amended  
12 (the "Act"), in connection with a posting made on Examiner's website relating to a  
13 fundraiser for David Smith's congressional campaign (the "Announcement"). In light of  
14 the *de minimis* amount of the alleged in-kind contribution, the Commission exercised its  
15 prosecutorial discretion and dismissed the complaint.

16 Examiner operates a website that provides local information, resources, and  
17 perspectives on approximately 240 different cities in North America, almost exclusively  
18 through user-generated content. Examiner Resp., 2. Contributors (hired as independent  
19 contractors and referred to as "Examiners") are recruited and paid for their contributions  
20 to the website on the basis of page views, unique visitors, session length, and advertising  
21 performance. *Id.* While Examiner does not review or edit postings submitted by  
22 Examiners, it retains the right to remove any posting in the event the posting does not

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1 comply with Examiner's policies, or in the event Examiner finds the posting  
2 unacceptable for any other reason. *Id.*

3 David Smith ("Smith") was a candidate for the Republican nomination in the race  
4 for U.S. Representative from Texas' 32<sup>nd</sup> Congressional District.<sup>1</sup> A Statement of  
5 Organization designating Friends of David Smith as Smith's principal campaign  
6 committee was filed on December 30, 2009.

7 Smith became the Examiner assigned to report on Dallas County Republican  
8 politics in July 2009, and since that time has contributed approximately 300 postings.  
9 See Dallas County Republican Examiner's Articles, [http://www.examiner.com/x-17004-](http://www.examiner.com/x-17004-Dallas-County-Republican-Examiner)  
10 [Dallas-County-Republican-Examiner](http://www.examiner.com/x-17004-Dallas-County-Republican-Examiner). On November 3, 2009, Smith posted the  
11 Announcement on Examiner's website declaring his candidacy and including information  
12 about his "Fundraiser & Campaign Kick-Off," to be hosted at a local restaurant. The  
13 Announcement also included a disclaimer stating that the "event notification" was not  
14 subject to state reporting requirements. Examiner Resp., 2. In his response, Smith states  
15 that he is paid an average of one cent per page view for his postings, and that his  
16 remuneration for the posting in question was approximately one dollar. Smith Resp., 2.  
17 The Examiner estimated that under their contract, Smith earned a total of \$8.06 for the  
18 posting. Examiner Resp., 2.

19 The Complaint alleges that the Examiner Entities made prohibited corporate  
20 contributions in connection with a coordinated communication in violation of 2 U.S.C. §

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<sup>1</sup> The Republican primary was held on March 2, 2010, and the incumbent, Rep. Pete Sessions, garnered approximately 83% of the votes cast, defeating Smith. Office of the Secretary of State of Texas, *2010 Republican Party Primary Election, Election Night Returns* at [http://enr.sos.state.tx.us/enr/results/mar02\\_148\\_state.htm](http://enr.sos.state.tx.us/enr/results/mar02_148_state.htm).

1 441b. Complainant further alleges that the Announcement failed to include disclaimers  
2 required by 2 U.S.C. § 441d.

3 After receiving the Complaint, Examiner removed the Announcement from its  
4 website and suspended Smith from posting additional material pending the resolution of  
5 this matter. Examiner Resp., 3. The Examiner Entities' response to the Complaint  
6 argues that: (1) there has been no transfer of value that could qualify as a "contribution"  
7 or "expenditure" under the Act; (2) even if the Announcement did qualify as a  
8 "contribution" or "expenditure," the press exemption applies; (3) Examiner, as an  
9 "independent internet medium," has no disclosure or disclaimer requirement with respect  
10 to the Announcement; (4) Examiner is immune from civil liability pursuant to Section  
11 230 of the Communications Decency Act of 1996; and (5) the amount in question is *de*  
12 *minimis*. See generally Examiner Resp.

13 Smith also filed a response in which he asks the Commission to dismiss the  
14 Complaint brought by a supporter of his political opponent because the Announcement  
15 "was treated not as a paid advertisement but as newsworthy content" and Smith's "intent  
16 was not to skirt the laws . . . but to make public an announcement." Smith Resp., 4.

17 The amount of the alleged in-kind contribution in this matter is *de minimis*.  
18 Additionally, the evidence shows that Examiner removed the Announcement from its  
19 website upon receiving notification of the Complaint. In light of the overall  
20 circumstances, it would not be an efficient use of the Commission's resources to pursue  
21 this matter further. Accordingly, the Commission exercised its prosecutorial discretion  
22 and dismissed the complaint as to Anschutz Company and Clarity Digital Group, LLC,  
23 d/b/a Examiner.com. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The

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- 1 Commission did not determine the applicability of the press exemption or Section 230 of
- 2 the Communications Decency Act of 1996 to this matter.

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3  
4 **RESPONDENTS:** Friends of David Smith and Lucie Weaver, MUR: 6247  
5 in her official capacity as Treasurer

6 David A. Smith  
7

8 This matter was generated by a complaint filed by Vickers L. Cunningham. See  
9 2 U.S.C. § 437(g)(a)(1). The complaint alleged that David Smith ("Smith") and Friends  
10 of David Smith and Lucie Weaver, in her official capacity as Treasurer ("the  
11 Committee"), violated the Federal Election Campaign Act of 1971, as amended (the  
12 "Act"), in connection with a posting made on Examiner's website relating to a fundraiser  
13 for Smith's congressional campaign (the "Announcement"), and that Smith failed to file a  
14 timely Statement of Candidacy. In light of the *de minimis* amount of the alleged in-kind  
15 contribution, the Commission exercised its prosecutorial discretion and dismissed the  
16 complaint.

17 Clarity Digital Group, LLC, d/b/a Examiner.com ("Examiner") (together with  
18 Anschutz Company ("Anschutz"), the "Examiner Entities") operates a website that  
19 provides local information, resources, and perspectives on approximately 240 different  
20 cities in North America, almost exclusively through user-generated content. Examiner  
21 Resp., 2. Contributors (hired as independent contractors and referred to as "Examiners")  
22 are recruited and paid for their contributions to the website on the basis of page views,  
23 unique visitors, session length, and advertising performance. *Id.* While Examiner does  
24 not review or edit postings submitted by Examiners, it retains the right to remove any

1 posting in the event the posting does not comply with Examiner's policies, or in the event  
2 Examiner finds the posting unacceptable for any other reason. *Id.*

3 Smith was a candidate for the Republican nomination in the race for U.S.  
4 Representative from Texas' 32<sup>nd</sup> Congressional District.<sup>1</sup> A Statement of Organization  
5 designating Friends of David Smith as Smith's principal campaign committee was filed  
6 on December 30, 2009.

7 Smith became the Examiner assigned to report on Dallas County Republican  
8 politics in July 2009, and since that time has contributed approximately 300 postings.  
9 *See* Dallas County Republican Examiner's Articles, [http://www.examiner.com/x-17004-](http://www.examiner.com/x-17004-Dallas-County-Republican-Examiner)  
10 [Dallas-County-Republican-Examiner](http://www.examiner.com/x-17004-Dallas-County-Republican-Examiner). On November 3, 2009, Smith posted the  
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12 about his "Fundraiser & Campaign Kick-Off," to be hosted at a local restaurant. The  
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14 subject to state reporting requirements. Examiner Resp., 2. In his response, Smith states  
15 that he is paid an average of one cent per page view for his postings, and that his  
16 remuneration for the posting in question was approximately one dollar. Smith Resp., 2.  
17 The Examiner estimated that under their contract, Smith earned a total of \$8.06 for the  
18 posting. Examiner Resp., 2.

19 The Complaint alleges that Smith and the Committee accepted prohibited  
20 corporate contributions in connection with a coordinated communication in violation of 2  
21 U.S.C. § 441b. Complainant further alleges that the Announcement failed to include

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<sup>1</sup> The Republican primary was held on March 2, 2010, and the incumbent, Rep. Pete Sessions, garnered approximately 83% of the votes cast, defeating Smith. Office of the Secretary of State of Texas, *2010 Republican Party Primary Election, Election Night Returns* at [http://enr.sos.state.tx.us/enr/results/mar02\\_148\\_state.htm](http://enr.sos.state.tx.us/enr/results/mar02_148_state.htm).

1 disclaimers required by 2 U.S.C. § 441d. Lastly, Complainant alleges that Smith violated  
2 2 U.S.C. § 432 by failing to file a Statement of Candidacy with the Commission.

3 After receiving the Complaint, Examiner removed the Announcement from its  
4 website and suspended Smith from posting additional material pending the resolution of  
5 this matter. Examiner Resp., 3. The Examiner Entities' response to the Complaint  
6 argues that: (1) there has been no transfer of value that could qualify as a "contribution"  
7 or "expenditure" under the Act; (2) even if the Announcement did qualify as a  
8 "contribution" or "expenditure," the press exemption applies; (3) Examiner, as an  
9 "independent internet medium," has no disclosure or disclaimer requirement with respect  
10 to the Announcement; (4) Examiner is immune from civil liability pursuant to § 230 of  
11 the Communications Decency Act of 1996; and (5) the amount in question is *de minimis*.  
12 See generally Examiner Resp.

13 Smith also filed a response in which he asks the Commission to dismiss the  
14 Complaint brought by a supporter of his political opponent because the Announcement  
15 "was treated not as a paid advertisement but as newsworthy content" and Smith's "intent  
16 was not to skirt the laws . . . but to make public an announcement." Smith Resp., 4.

17 The amount of the alleged in-kind contribution in this matter is *de minimis*.  
18 Additionally, the evidence shows that Examiner removed the Announcement from its  
19 website upon receiving notification of the Complaint. In light of the overall  
20 circumstances, it would not be an efficient use of the Commission's resources to pursue  
21 this matter further. Accordingly, the Commission exercised its prosecutorial discretion  
22 and dismissed the complaint as to David Smith and Friends of David Smith and Lucie  
23 Weaver, in her official capacity as Treasurer. See *Heckler v. Chaney*, 470 U.S. 821, 831



- 1 (1985). The Commission did not determine the applicability of the press exemption or
- 2 Section 230 of the Communications Decency Act of 1996 to this matter.

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